The Boeing Company *and* Society of Professional Engineering Employees in Aerospace, IFPTE Local 2001. Cases 19–CA–090932, 19–CA–090948, and 19–CA–095926

July 17, 2018

ORDER DENYING MOTION

BY CHAIRMAN RING AND MEMBERS PEARCE, MCFERRAN, KAPLAN, AND EMANUEL

On January 10, 2018, the International Union of Painters and Allied Trades, District Council 15, Local 159, AFL–CIO (Local 159), which is not a party to this proceeding, filed a motion to intervene and for reconsideration of the Board's decision issued on December 14, 2017, reported at 365 NLRB No. 154 (hereinafter *Boeing*). Thereafter, Respondent Boeing Company filed an opposition to the motions, and Local 159 filed a reply. For the reasons that follow, the motion to intervene is denied, and the motion for reconsideration is dismissed as moot. [1]

Local 159 is the charging party in *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, 28–CA–060841. In its August 27, 2015 decision in that case, reported at 362 NLRB No. 190 (hereinafter *Rio All-Suites*), the Board found, among other things, that the respondent violated Section 8(a)(1) of the Act by maintaining several workplace rules, including two conduct standards stating, in relevant part, that "[c]amera phones may not be used to take photos on property without permission from a Director or above," and "[c]ameras, any type of audio visual recording equipment and/or recording devices may not be used unless specifically authorized for business purposes (e.g. events)." In so finding, the Board applied the "reasonably construe" standard set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), under which an employer would be found to have violated Section 8(a)(1) of the Act by maintaining a workplace rule that employees would reasonably construe to prohibit the exercise of Section 7 rights. On May 11, 2017, the Board filed an application for enforcement of its order in *Rio All-Suites* with the United States Court of Appeals for the Ninth Circuit. Local 159 moved to intervene, and the Ninth Circuit granted the motion.

On December 14, 2017, while *Rio All-Suites* was pending in the Ninth Circuit, the Board issued a decision in this case, in which, among other things, it (i) overruled *Lutheran Heritage's* "reasonably construe" standard, (ii) designated rules that may be lawfully maintained as "category 1" rules, (iii) held that rules restricting the use of cameras or camera-enabled devices belong in category 1, and (iv) overruled *Rio All-Suites* to the extent the Board had found the maintenance of the above no-camera rules unlawful. After *Boeing* issued, the Board filed a motion with the Ninth Circuit to remand the workplace-rules findings in *Rio All-Suites* for reconsideration in light of *Boeing*. Local 159 filed an opposition to the Board's remand motion. On April 24, 2018, the Ninth Circuit granted the Board's motion and remanded *Rio All-Suites*.

In the instant motion, Local 159 moves to intervene in this case "for the purpose of seeking Reconsideration of [*Boeing*]." Local 159 states that it "do[es] not concede" that *Boeing* "effectively vacates" *Rio All-Suites*, but it contends that the respondent in *Rio All-Suites* will argue as much and that *Boeing* "may have that impact." Local 159 contends that *Boeing* "was issued without due process to" Local 159 because it did not have prior notice that the Board would issue a decision in *Boeing* that "af-

[1] On April 17, 2018, Local 159 filed a motion requesting that Chairman Ring recuse himself from participating in this case. The Chairman, in consultation with the Board's Designated Agency Ethics Official, has determined not to recuse himself. Under paragraph 6 of the Trump Ethics Pledge, which Chairman Ring has signed pursuant to Executive Order 13770, the Chairman, for the first 2 years of his term, may not participate in cases in which his former firm represents a party or in which one of his former clients is or represents a party. Boeing is not the Chairman's former client, and his former firm does not represent any party to this case. In addition, no person with whom Chairman Ring has a covered relationship within the meaning of 5 CFR § 2635.502 is or represents a party to this case, nor does Chairman Ring believe that his participation would "cause a reasonable person with knowledge of the relevant facts to question his impartiality," id.

In its pending motion to intervene, Local 159 argues, among other things, that Member Emanuel recuse himself from participating in this case because of his former affiliation with the law firm of Littler Mendelson. Member Emanuel, in consultation with the Board's Designated Agency Ethics Official (DAEO), has determined not to recuse himself. Under paragraph 6 of the Trump Ethics Pledge, which Member Emanuel has signed as required by Executive Order 13770, Member Emanuel may not participate for the first 2 years of his term in cases in which his former firm, Littler Mendelson, represents a party, or in which one of his former clients is or represents a party. Boeing is not Member Emanuel's former client, and Littler Mendelson does not represent any party to this case. In addition, no person with whom Member Emanuel has a covered relationship within the meaning of 5 CFR § 2635.502 is or represents a party to this case, nor does Member Emanuel believe that his participation would "cause a reasonable person with knowledge of the relevant facts to question his impartiality." Id.

On April 24, 2018, Local 159 filed a motion requesting that Chairman Ring and Members Emanuel and Kaplan "immediately cease deciding any Board cases including this case." The request is denied.

fects [Local 159's] rights." Local 159 cites no authority for the proposition that it has been denied due process.[2]

First, the Board's rules do not provide for intervention under the circumstances presented here. Section 102.29 of the Board's Rules and Regulations states, in relevant part, as follows:

> Any person desiring to intervene in any proceeding must file a motion in writing or, if made at the hearing, may move orally on the record, stating the grounds upon which such person claims an interest. Prior to the hearing, such a motion must be filed with the Regional Director issuing the complaint; during the hearing, such motion must be made to the Administrative Law Judge.

Under Section 102.29, a "person desiring to intervene" may do so before the hearing begins or while the hearing is in progress. The Board's rules do not otherwise permit intervention. No provision is made in the Board's rules for intervention after the close of the hearing, let alone after the Board has issued its decision, as Local 159 seeks here.[3]

Second, whenever the Board issues a decision that overrules precedent and applies that decision retroactively—and retroactive application of new standards is the Board's usual practice[4]—it is virtually certain that live cases will be affected.[5] Absent rulemaking, the only way to ensure that parties in such cases have a prior opportunity to be heard would be to issue a notice and invitation to file briefs. The Board often does so, but far from always;[6] it has never held that it must do so; and no court has ever denied enforcement of a Board decision overruling precedent on the ground that the Board was required to solicit prior briefing from the public and failed to do so.

Third, even if Local 159 would otherwise have a right to be heard in this case on *Boeing*'s overruling of *Rio All-Suites*, Local 159 sacrificed that right when it opposed the Board's motion in the Ninth Circuit to remand *Rio All-Suites*. Obviously, Local 159 would have an opportunity in *Rio All-Suites*—a case in which it is already a party—to claim that its due-process rights were violated by the Board's decision in *Boeing*. By opposing the Board's motion to remand *Rio All-Suites*, Local 159

[2] Local 159 references 5 U.S.C. § 554. That section of the Administrative Procedure Act relevantly states that "[p]ersons entitled to notice of an agency hearing" must timely receive certain information, but § 554 does not set forth criteria for deciding the issue here, i.e., *whether* Local 159 was entitled to such notice in *Boeing*. Local 159 also broadly refers to "Board Rules of Procedure" without citing any specific rule or rules, and "the Due Process Clause of the U.S. Constitution."

[3] See also *United States Postal Service*, 05–CA–122166, 2015 WL 3932157 (June 25, 2015) (denying motion to intervene filed after issuance of Board's decision as untimely under Sec. 102.29, among other reasons). We recognize that, in rare instances, the Board has permitted posthearing intervention. We need not address those decisions here, given that intervention is unwarranted on multiple grounds in addition to Sec. 102.29. Notably, however, the dissent cites no case in which the Board has ever permitted posthearing intervention by an entity that asserts interests it can fully protect in another pending case in which it is already a party—here, *Rio All-Suites*. In the cases cited by the dissent where the Board has allowed posthearing intervention, the fact that the would-be intervenor possessed an interest that could only be protected by granting intervention was apparent. See *Drukker Communications*, 299 NLRB 856 (1990) (permitting posthearing intervention by entity that had purchased the respondent's assets and was therefore exposed to potential successor liability); *Premier Cablevision*, 293 NLRB 931 (1989) (same); *Postal Service*, 275 NLRB 360 (1985) (permitting posthearing intervention by national union, where respondent claimed that national union and not charging party local union represented the bargaining unit); *William Penn Broadcasting Company*, 94 NLRB 1175 (1951) (permitting posthearing intervention by union #2, with which respondent had entered into a renewal collective-bargaining agreement at a time when a representation petition filed by charging party union #1 was pending before the Board). To extend these cases to the situation presented here, where Local 159 claims an interest it can protect in another pending case, would create a precedent for posthearing intervention whenever a would-be intervenor simply claims an interest implicated in the case. If that were the law, there would be no finality to any decision; the Board would be continually revisiting its decisions on motions to intervene and for reconsideration filed by strangers to the case claiming an implicated interest. It serves no purpose and certainly does not advance the fundamental purpose of the NLRA—to promote industrial peace—to keep workplace disputes unresolved while everybody and his uncle with a claimed "interest" lines up to reargue cases that have already been decided. Although the dissent believes this concern is misplaced, the fact remains that if the Board permitted intervention here, it would be the first time that posthearing intervention was allowed where the moving party was fully capable of protecting its interests in a pending case to which it was already a party. Litigants would predictably seek to exploit such a precedent. Even if unsuccessful, their motions would waste the Board's time and resources.

At the same time, we cannot agree with the dissent's approach to interpreting the Board's Rules. In the dissent's apparent view, if a rule provides that a party may take a specific action at a specific time, parties are free to take that action at other times as well unless the rule explicitly states otherwise. Such a view would turn the Board's Rules and Regulations into Suggestions and Recommendations. In our view, a rule that designates a specific time when X may be done necessarily implies that X may *not* be done at other times. Of course, rules of procedure typically provide avenues for requesting permission to take actions out of time—see, e.g., Board Rules and Regulations Sec. 102.2(d)—but such procedures only confirm the prohibitive force of the underlying rule, i.e., that absent permission, parties may *not* act out of time.

[4] See, e.g., *Purple Communications, Inc.*, 361 NLRB 1050, 1065–1066 (2014); *SNE Enterprises*, 344 NLRB 673, 673 (2005).

[5] The dissent claims there is a "clear distinction" between live cases pending before a court of appeals and live cases pending before the Board, on the basis that in the latter, parties "will be able to argue about how the new principle should apply to the particular facts of their cases." But where the allegation in a pending case squarely relies on the overruled precedent, retroactive overruling is usually dispositive, leaving nothing to argue about.

[6] See, e.g., *PCC Structurals, Inc.*, 365 NLRB No. 160, slip op. at 11–12 (2017) (citing six cases decided over the course of 3 years—2014–2016—that overruled precedent without prior notice to the public and an invitation to file briefs).

sought to deny itself the very opportunity it seeks here. Local 159 cannot now be heard to argue that the Board must permit it to intervene in this case on due process grounds, after having opposed the very remand that would have given it the opportunity to make its arguments—including its due-process argument—in the case in which it is already a party, *Rio All-Suites*.[7]

Finally, despite Local 159's opposition to the Board's remand motion, the Ninth Circuit granted that motion and remanded *Rio All-Suites* to the Board. With *Rio All-Suites* pending again before the Board, Local 159 will have the very opportunity in that case that it seeks in this case by its motion to intervene: the opportunity to make whatever arguments regarding *Boeing* it wishes to make, including that the Board erred when it designated all no-camera rules as Category 1 rules and thus always lawful, or that the Board should reconsider the system of categories adopted in *Boeing*, or that it should scrap *Boeing* altogether and either start over or reinstitute the "reasonably construe" test of *Lutheran Heritage*.[8] In other words, Local 159 will have the opportunity to urge the Board to reconsider *Boeing* and reinstate *Rio All-Suites*, which makes it pointless to permit Local 159 to intervene in this case in order to urge the very same thing. If Local 159 were to do so, and if the Board were to reaffirm *Boeing* on remand in *Rio All-Suites*,[9] Local 159 would be able to petition for appellate review of that decision and thus bring the merits of the Board's decision in *Boeing* before the court of appeals.[10] Accordingly, we reject Local 159's claim that due process requires that Local 159 be allowed to intervene here.[11]

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[7] The dissent characterizes this rationale as "nonsense," but in our view the dissent simply does not like the sense it makes. Now that *Rio All-Suites* has been remanded, allowing intervention here would merely permit Local 159 to present its arguments about *Boeing* in two cases instead of one. One will suffice. Indeed, the dissent makes form-over-substance due-process claims that are concocted from form-over-substance due-process deficiency allegations. The dissent alleges that because the decision in this case expressly stated that *Rio All-Suites* was overruled—a truism, given that *Boeing* placed all no-camera rules in category 1—this case is like no other where the Board has overturned precedent without seeking briefing prior to applying a new holding retroactively. To fix this pretend due-process problem, the dissent says due process requires that Local 159 be permitted to argue its case here, in the first instance, as opposed to in its own case, *Rio All-Suites*, on its own record evidence. Whether here or there, Local 159 will be making its arguments to the same Board, and whether here or there, Local 159 will be attempting to persuade the Board to revisit *Boeing*, or at least to reconsider whether applying it retroactively to *Rio All-Suites* would work a manifest injustice. We think it makes more sense, and better protects the finality interests of the parties in this case, to allow Local 159 to argue its case in the context of the facts of its own case. Moreover, considering the regularity with which Board precedent changes when Board majorities change, and the multitude of precedent-changing decisions issued over the past several years by the Board's erstwhile majority, the dissent's suggestion that Local 159 is disadvantaged in making its *Boeing*-related arguments in *Rio All-Suites* instead of *Boeing* because of "the doctrine of *stare decisis*" is singularly unpersuasive.

[8] Local 159 will also have the opportunity to argue that because *Rio All-Suites* was pending in the Ninth Circuit when *Boeing* issued, the Board lacked jurisdiction to overrule it—an argument the dissent repeatedly hints at but never actually makes. Instead, the dissent states the unremarkable proposition that the Board lacks jurisdiction to *reconsider* a case that is pending in a court of appeals, and implies a lack of jurisdiction to *overrule* such a case. The dissent cites no authority for this proposition, and we are aware of none. Indeed, if the dissent's suggestion were correct, then the Court of Appeals for the D.C. Circuit would not have remanded *Browning-Ferris* in the wake of the Board's first decision in *Hy-Brand*, which overruled *Browning-Ferris*. See *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*, 365 NLRB No. 156 (2017), vacated 366 NLRB No. 26 (2018). The court would have held that the Board was without jurisdiction to overrule *Browning-Ferris*. That it did not reveals the baselessness of the dissent's suggestion.

[9] The dissent claims that dismissal of the no-camera-rule allegation in *Rio All-Suites* is "inevitable." That is more than we know. For one thing, Local 159 may argue that *Boeing* was wrongly decided, and may articulate reasons not considered there. For another, Local 159 may argue that even if the Board adheres to its decision in *Boeing*, it should not apply that decision retroactively to *Rio All-Suites*, notwithstanding that the Board in *Boeing* found retroactive application of its decision appropriate. Such an argument would not be unprecedented. In *Wal-Mart Stores, Inc.*, 351 NLRB 130 (2007), the Board declined to apply *IBM Corp.*, 341 NLRB 1288 (2004), retroactively, despite the fact that the Board in *IBM Corp.* applied that decision retroactively, because retroactive application in *Wal-Mart Stores* would have worked a manifest injustice. Nothing prevents Local 159 from advancing a similar argument in *Rio All-Suites*.

[10] Accordingly, we reject the dissent's provocative suggestion that by denying Local 159's motion to intervene, we seek "to insulate *Boeing* from full judicial scrutiny." And of course, Local 159 is not the only entity that can place the standard adopted in *Boeing* before a court of appeals. The charging party in *Boeing* itself may file a petition for review of the *Boeing* decision. The dissent notes that it has not done so, but it may yet: the Act places no time limit on the filing of a petition for review.

[11] We do not concede, however, that had the Ninth Circuit denied the Board's motion to remand *Rio All-Suites*, Local 159 would have had a due-process right to intervene here. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). The Board's decision in *Boeing* obviously did not deprive Local 159 of a liberty interest. See *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972) (holding that the liberty guaranteed by the Due Process Clause "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men") (internal quotations omitted). Neither did it deprive Local 159 of any interest in property. Local 159 may well view the decision in *Rio All-Suites* invalidating the respondent's no-camera rules as having conferred a benefit on itself and employees it represents. But "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. at

For all of these reasons, Local 159's motion to intervene is denied and the motion to reconsider is denied as moot.

Dated, Washington, D.C. July 17, 2018

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBERS PEARCE and MCFERRAN, dissenting.

The Painters Union[1] moves to intervene for the purpose of seeking reconsideration of the Board's December 14, 2017 decision in this case. Because the Union correctly asserts that its interests were directly affected by the decision, due process demands that its motion be granted. Unfortunately, the Board majority takes another course, continuing the agency's disregard for basic procedural fairness that has marked this case from the beginning. If the Board wants its decisions viewed as legitimate, and treated with deference, it will have to do better than this.

I.

In its December 2017 decision, a divided Board overruled the well-established standard it had applied in cases involving facial challenges to employer rules that do not explicitly restrict activities protected by Section 7 of the National Labor Relations Act.[2] No party to the case had asked the Board to overrule the *Lutheran Heritage* standard. Nor did the Board notify the parties or the public, in advance, that it intended to overrule the standard (and apply a new standard retroactively). This was a significant departure from Board norms, as the dissenters pointed out.[3]

But that was not all. Not satisfied with overruling the *Lutheran Heritage* standard sua sponte and without notice, the *Boeing* Board also expressly overruled the Board's 2015 decision in *Rio All-Suites*,[4] a decision pending on review in the U.S. Court of Appeals for the Ninth Circuit and over which the Board lacked jurisdiction.[5] In *Rio All-Suites*, the Board (applying the *Lutheran Heritage* standard) had invalidated an employer's no-camera rule. The *Boeing* majority, however, held that no-camera rules are *always lawful* to maintain.[6]

The Painters Union seeking intervention here was the charging party in *Rio All-Suites*. Of course, it had no notice that the Board intended to reverse the 2015 decision in its favor—and no reason to suspect that the Board would do so: no party in *Boeing* had asked the Board to overrule *Lutheran Heritage*, much less *Rio All-Suites*, and, indeed, *Rio All-Suites* was pending in the Ninth Circuit, where the court had exclusive jurisdiction.

No party has sought judicial review of the Board's *Boeing* decision, overruling *Rio All-Suites*. The Painters Union, of course, was not a party—though perhaps it could be argued that it would have standing to challenge

577. Clearly, Local 159 is not *entitled* to a decision that invalidates Rio All-Suites' no-camera rules, such that it must be given notice and an opportunity to be heard before that decision can be overruled. Indeed, in *Rio All-Suites* itself, the General Counsel litigated those rules in the *public's* interest, not the Union's. See *Amalgamated Utility Workers v. Consolidated Edison Co. of New York*, 309 U.S. 261, 265 (1940) (holding that the "Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce"); see also *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307 (1959) (rejecting the notion that the "statutory machinery" of the Act is "a vehicle for the vindication of private rights").

The dissent claims that the above remarks "suggest[]" that we would reject Local 159's position even if we permitted it to intervene. As should be clear to every fair-minded reader, the only issue we address herein is *whether* to permit Local 159 to intervene. In that regard, we have rejected the dissent's claim that due process requires us to do so. We recognize, as the dissent reminds us, that charging parties have due-process rights under the Administrative Procedure Act, and that, under *International Union, UAW v. Scofield*, 382 U.S. 205 (1965), charging parties are entitled to seek judicial review of an adverse Board order and to intervene in an appellate review proceeding in order to defend a favorable Board order. But these reminders miss the mark, given that Local 159 is *not* the charging party in this case, and the issue presented here is whether to allow it to *become* a party. Even assuming that due process would require us to permit Local 159 to intervene were this the only case in which it could present its *Boeing*-related arguments, it is not the only case. Local 159 may present those arguments in *Rio All-Suites*. It will have a full and fair opportunity to be heard there. For this reason if for no other, we deny the motion to intervene.

[1] International Union of Painters and Allied Trades, District Council 15, Local 159, AFL–CIO.

[2] *The Boeing Co.*, 365 NLRB No. 154 (2017), overruling analytical framework set forth in *Lutheran-Heritage Livonia*, 343 NLRB 646 (2004).

[3] Id., slip op. at 31–33 (dissenting opinion of Member McFerran).

[4] Id., slip op. at 19 fn. 89, overruling *Caesars Entertainment d/b/a Rio All-Suites Hotel & Casino*, 362 NLRB No. 190 (2015).

[5] Under Sec. 10(e) of the Act, once the record in a case is filed with a reviewing court of appeals, the Board loses jurisdiction. 29 U.S.C. §160(e) ("Upon the filing of the record with it the jurisdiction of the court shall be exclusive. . . . "). In seeking remand of *Rio All-Suites*, the Board expressly acknowledged the court's exclusive jurisdiction.

[6] 365 NLRB No. 154, slip op. at 15, 19 fn. 89.

the Board's decision, under Section 10(f) of the Act, as a "person aggrieved by [the] final order of the Board" there.[7] Sensibly, the Painters Union has instead sought to intervene in this case and to seek reconsideration of the Board's decision, including the sua sponte overruling of *Rio All-Suites*.

Following issuance of the *Boeing* decision, the Ninth Circuit—at the Board's request, and without elaboration—remanded the *Rio All-Suites* case to the Board, for reconsideration in light of *Boeing*.[8] The Painters Union had opposed remand, arguing in part that it had sought to intervene in this case and seek reconsideration of the *Boeing* decision.

II.

The threshold question here is whether the Painters Union is entitled to intervene in this case, so that it may argue that the *Boeing* Board violated due process when it overruled *Rio All-Suites*—without first providing the Union with notice and an opportunity to be heard. The due-process violation is clear. The Painters Union was a party in the pending case, and its victory was stripped away in what amounted to a secret re-adjudication. The majority today arbitrarily denies intervention, sidestepping the due-process issue and creating an obstacle to judicial review of *Boeing*.

A.

Section 10(b) of the Act, which governs unfair labor practice proceedings, provides that "[i]n the discretion of the member, agent, or agency conducting the hearing *or the Board*, any other person [in addition to the respondent] may be allowed to intervene in the said proceeding."[9]

Intervention here is clearly warranted. It is obvious that the Painters Union has an interest implicated in this case that it cannot protect unless intervention is granted. In expressly overruling the no-camera-rule holding in *Rio All-Suites* and announcing that such rules are always lawful, the *Boeing* decision stripped the Painters Union of the victory it had won before the Board—without notice and an opportunity to be heard.

As the charging party in *Rio All-Suites*, the Painters Union was, of course, a *party* to that case with a commensurate legal interest at stake in the proceeding and its outcome.[10] The charging party in a Board case, in turn, is entitled by the Act both to seek judicial review of an adverse Board order and to defend a Board order favorable to it, as the Supreme Court has held in the *Scofield* case.[11] In holding that charging parties are entitled to intervene to defend a Board order, the Court rejected the view that the charging party has no separate interest to protect, beyond the "public interest" represented by the General Counsel. Rather, it was clear that the "charging party may have vital 'private rights' in the Board proceeding."[12]

No one could deny, then, that the Painters Union, as the charging party, had the right to participate fully in *Rio All-Suites*. But it should be equally apparent that the Painters Union must be granted intervention in *this* proceeding, given the direct and dispositive effect of the *Boeing* decision on the interest of the Painters Union at stake in *Rio All-Suites*. The *Boeing* Board not only held that no-camera rules were always lawful, but went so far as to explicitly overrule *Rio All-Suites*. *Boeing*, in other words, conclusively disposed of the no-camera-rule issue in *Rio All-Suites.* On remand of *Rio All-Suites* from the Ninth Circuit, nothing remains for the Board to do except to follow precedent, established in *Boeing*, and dismiss the complaint allegation—unless, of course, the Board grants the Painters Union motion to intervene here and reconsiders *Boeing*, as it should.

The Painters Union thus has a compelling interest in intervention. In contrast, the majority's reasons for denying intervention here do not pass scrutiny. Its denial, therefore, amounts to an abuse of the Board's discretion.

1.

That the "Board's rules do not provide for intervention under the circumstances presented here," as the majority observes, is immaterial, as Board precedent demonstrates. There is no support for the proposition that intervention cannot be granted after the close of the hearing

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[7] 29 U.S.C. §160(f).

[8] The Board's motion for partial remand did not mention *Boeing*'s explicit overruling of *Rio All-Suites* with respect to the no-camera rule violation found there.

[9] 29 U.S.C. §160(b) (emphasis added).

[10] The Board's Rules and Regulations define the term "party" to include "any person filing a charge . . . under the Act." Board's Rules & Regulations, Sec. 102.1(h). As the Supreme Court has explained:

> When the General Counsel issues a complaint and the proceeding reaches the adjudicative stage, the course the hearing will take is in the agency's control, but the charging party is accorded formal recognition: he participates in the hearings as a "party;" he may call witnesses and cross-examine others, may file exceptions to any order of the trial examiner [now administrative law judge], and may filed a petition for reconsideration to a Board order.

International Union, UAW v. Scofield, 382 U.S. 205, 219 (1965) (footnote omitted).

[11] *Scofield*, supra, 382 U.S. at 219–222.

[12] Id. at 220. The Court observed that: "[T]he statutory pattern of the [National Labor Relations Act] does not dichotomize 'public' as opposed to 'private' interests. Rather, the two interblend in the intricate statutory scheme." Id. (footnote omitted).

before the administrative law judge. While the text of the Board's rule affirmatively provides for intervention before or during the hearing, it does not *prohibit* intervention after the hearing, e.g., while the case is pending before the Board on exceptions from a decision of the administrative law judge.[13] And, indeed, the Board has *granted* intervention in cases pending before it, rejecting the argument that the absence of a rule "authorizing intervention before the Board" was precluded intervention.[14] In other cases, the Board has also granted intervention in a pending case.[15] The Board has never held, meanwhile, that it lacks authority to do so. Where it has denied intervention, the Board has done so based on the particular circumstances. In one case, for example, intervention was sought for the first time after (1) the Board had issued its order, (2) a petition for review was filed in the court of appeals, and (3) the court remanded the case to the Board.[16] The Board held the motion to intervene untimely, noting that the movant had not explained its failure to seek intervention "before the Board while the case was pending on exceptions" and had "not shown any changed circumstances warranting its late intervention."[17]

There is no support, meanwhile, for any claim that the Board lacks the power to grant intervention in a proceeding *after* it has issued its decision and order, assuming that the Board retains jurisdiction over the case consistent with Section 10(e) of the Act (i.e., that the record has not been filed in a court of appeals, following the filing of a petition for review of the Board's order). The Board has, indeed, granted intervention in such circumstances,[18] and it would be justified in doing so here.[19]

The Board has jurisdiction over this case, where no petition for review has been filed. And it cannot fairly be argued that the motion to intervene here is untimely. The Painters Union was not on notice that the Board intended to overrule *Rio All-Suites*. No party had asked the Board to do so, the Board never provided notice to the public or the parties of its intention, and the Board no longer had jurisdiction over *Rio All-Suites*, which was pending in the Ninth Circuit. However, once the *Boeing* decision issued, the Painters Union acted promptly, filing its motion to intervene within the 28 days provided by the Board's rules for seeking reconsideration of a Board decision and order.[20] The single, unpublished decision cited by the majority to support its contrary position is easily distinguishable on its facts.[21]

[13] Sec. 102.29 of the Board's Rules and Regulations provides in relevant part that:

> Any person desiring to intervene in any proceeding must file a motion in writing or, if made at the hearing, may move orally on the record, stating the grounds upon which such person claims an interest. Prior to the hearing, such a motion must be filed with the Regional Director issuing the complaint; during the hearing, such motion must be made to the Administrative Law Judge.

The rule nowhere refers to intervention *after* the hearing, whether to expressly permit it or to prohibit it. But there is no good reason to interpret the rule's silence as a prohibition.

First, the Board's rules themselves provide that the "Rules and Regulations . . . will be liberally construed to effectuate the purposes and provisions of the Act." Board's Rules and Regulations, Sec. 102.121. Permitting intervention by a person with a cognizable interest in a pending case effectuates the Act's purposes.

Second, some cases are brought directly to the Board, bypassing a hearing before an administrative law judge, by stipulation of the parties, as approved by the Board. Board's Rules and Regulations, Sec. 102.35(a)(9). The Board has *granted* intervention in such situations. See, e.g., *Postal Service*, 279 NLRB 40 (1986) (granting motion to intervene after case was transferred to the Board on a stipulated record), enf. denied on other grounds, 827 F.2d 548 (9th Cir. 1987). The consequence of the majority's position here would be to prohibit intervention in such cases.

Finally, the Board's rules authorize the Board to order the transfer of any pending proceeding to itself. Board's Rules and Regulations, Sec. 102.50. If the Board has that power, it surely has the power to permit intervention in a proceeding already pending before it, just as Sec. 10(b) of the Act suggests

[14] See *Postal Service*, 275 NLRB 360, 360 fn. 1 (1985).

[15] See, e.g., *Premier Cablevision*, 293 NLRB 931, 931 fn. 1 (1989) (granting motion to intervene filed by possible successor employer after issuance of administrative law judge's decision, denying accompanying motion to dismiss as untimely and lacking in merit); see also *Presbyterian Hospital*, 285 NLRB 935, 935 fn. 1 (1987) (considering motion to intervene filed after issuance of administrative law judge's decision and denying it on the merits).

[16] *Oak Harbor Freight Lines, Inc.*, 361 NLRB No. 82, slip op. at 1 fn. 1 (2014).

[17] Id.

[18] See *Drukker Communications*, 299 NLRB 856, 856 (1990) (granting motion to intervene filed by possible successor employer after issuance of Board decision and order and denying accompanying motion for reconsideration as untimely); *William Penn Broadcasting Company*, 94 NLRB 1175, 1176 fn. 1 (1951) (granting motion to intervene and reopening record after issuance of Board decision and order dismissing complaint, 93 NLRB 1104 (1951)).

[19] The majority is mistaken in asserting that granting intervention here would mean that the "Board would continually be revisiting its decisions on motions to intervene and for reconsideration filed by strangers to the case claiming an implicated interest." The Painters Union is hardly an interloper here. The Union's clear and direct interest in this case was created by the *Boeing* Board itself, when the Board overruled *Rio All-Suites*, while the case was pending in the Ninth Circuit, without notice and an opportunity for the Painters to be heard. It will be the unusual case (one hopes) when a litigant finds itself in the same situation as the Painters Union here. Permitting intervention, then, hardly opens the Board's doors to "everybody and his uncle."

[20] See Board's Rules and Regulations, Sec. 102.48(c)(1), (2).

[21] In *United States Postal Service*, 05–CA–122166, 2015 WL 3932157 (June 25, 2015), the Board denied a motion to intervene as untimely in circumstances very different from those presented here. The moving party, a law firm whose connection to the case was entirely

2.

The majority's second argument for denying intervention simply fails to engage with the circumstances before the Board now. The majority says that "whenever the Board issues a decision that overrules precedent and applies that decision retroactively," as the *Boeing* majority did, "it is virtually certain that live cases will be affected."[22] But, the majority continues, the Board has never held that it "must" give parties to those cases notice of its intention to overrule precedent and an opportunity to be heard and "no court has ever denied enforcement of a Board decision overruling precedent on the ground that the Board was required to solicit prior briefing from the public and failed to do so."[23] These assertions beg the question presented by the Painters Union's motion.

The issue now is whether the Painters Union should be permitted to intervene, in order to present its arguments for Board reconsideration of *Boeing*. The Board need not decide whether the Union's arguments are meritorious.

In any case, the majority's attempt to dismiss those arguments summarily is badly mistaken, even on its own terms. *Rio All-Suites* was not simply a "live case" when *Boeing* was decided (and *Rio All-Suites* expressly overruled) without notice to the Painters Union and without an opportunity for the Union to be heard. It was a case (1) in which the Board had *already* ruled in favor of the Painters Union, (2) that was pending in a court of appeals, and (3) over which the Board lacked jurisdiction. No Board decision, and no judicial decision, has ever held that the Board was free to do what it did here: deprive the Painters Union of the benefit of a favorable Board decision in a pending case, with no notice and an opportunity to be heard, when it lacked jurisdiction over the case (and thus had no power to reconsider its earlier decision). Whether the *Boeing* Board's failure to provide public notice and invite briefing before overruling *Lutheran Heritage* sua sponte was a violation of the Due Process Clause and/or the Administrative Procedure Act is a separate question from the narrower issue presented by the Painters Union. We need not revisit that question now—all we need decide today is whether the *Boeing* majority erred with respect to its treatment of the Painters Union and *Rio All-Suites* in the particular circumstances at hand—and it is manifestly clear that the majority did err.

3.

The majority's third argument has even less merit than its other contentions. According to the majority, by opposing the remand of *Rio All-Suites* to the Board from the Ninth Circuit, the Union estopped itself from seeking intervention here. In the majority's words, the Union "sought to deny itself the very opportunity it seeks here" and so "cannot now be heard to argue that the Board must permit it to intervene." This argument is nonsense.

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unclear, sought intervention only after the administrative law judge had issued his decision, no party to the case had filed exceptions to the decision with the Board, and the Board had issued an order adopting the judge's decision in the absence of exceptions. The law firm filed its motion more than *3 months* after the Board's order. In explaining its delay in seeking intervention, the firm cited a lack of notice that the case was pending. The Board rejected this argument, observing that the firm had "disclosed no interest in this case that might even arguably have entitled it to notification of the charge or complaint." Here, in contrast, the interest of the Painters Union is clear, the Board's failure to provide notice is indisputable and unjustified, and the Union acted both reasonably and promptly in seeking intervention when it did.

[22] There is a clear distinction between the situation presented here and the more typical situation where a Board decision reversing precedent (and announcing a new legal principle) will be retroactively applied to cases pending *before the Board*. In the latter situation—where the Board's decision very often has been preceded by a public notice and invitation to file briefs–parties in pending cases will be able to argue about how the new principle should apply to the particular facts of their cases. Here, in contrast, *Boeing* summarily and specifically adjudicated the no-camera rule issue in *Rio All-Suites*, although that case was pending in the Ninth Circuit (not before the Board).

[23] To be sure, the majority cites no decision in which a Federal appellate court has actually *addressed* the argument that a Board decision reversing precedent should be set aside based on the Board's failure to provide prior public notice and invite briefing.

In *Boeing*, Member McFerran argued in dissent that the majority had "deliberately and arbitrarily excluded the public from participating in the policymaking process" in violation of the Administrative Procedure Act's requirement that the Board's adjudication amount to "reasoned decisionmaking." *Boeing*, supra, 365 NLRB No. 154, slip op. at 33–34 (dissenting opinion). Member Pearce's dissent similarly argued that the Board's failure to provide the public and the *Boeing* parties with notice and an opportunity to be heard was arbitrary and raised due process concerns. Id., slip op. at 25 & fn. 10 (dissenting opinion).

Notably, Federal appellate courts have made clear that when an administrative agency establishes a new rule through adjudication, due process requires notice and an opportunity to be heard. See, e.g., *Mobil Exploration & Producing North America, Inc. v. FERC*, 881 F.2d 193, 199 (5th Cir. 1989); *Ruangswang v. INS*, 591 F.2d 39, 44–46 (9th Cir. 1978). The Second Circuit, meanwhile, has criticized the Board for failing to give an employer notice of its intention to overrule precedent, but declined to remand the case because the employer's potential arguments had already been made, unsuccessfully, by the dissenting Board members. *NLRB v. A.P.W. Products Co.*, 316 F.2d 899, 906 (2d Cir. 1963). (The Second Circuit's rationale for declining to remand the case, notably, does not comport with the Supreme Court's later-expressed understanding of due-process requirements. See *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 471 (2000) (observing that "judicial predictions about the outcome of hypothesized litigation cannot substitute for the actual opportunity" to be heard).) See also *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 862 fn. 4 (2d Cir. 1966) (it is "highly undesirable for an agency to announce a new per se rule without either a rulemaking or an evidentiary hearing, thereby denying itself the light on the proper content of the rule which such proceedings would afford"); *NLRB v. E & B Brewing Co.* 276 F.2d 594, 599 (6th Cir. 1960) (Board not permitted to establish new legal rule "by an adjudication of a matter not in issue before it").

What the Union properly sought in the Ninth Circuit was to protect its prior victory before the Board from the reach of the *Boeing* decision, issued without notice and opportunity for the Union to be heard. Before the Board, the Union seeks to argue (as it wished to do before the Ninth Circuit) that *Boeing* was wrongly decided—albeit to do so, it must be permitted to intervene here. It is arbitrary to insist that the Union was somehow forced to choose between acquiescing in the remand of *Rio All-Suites* to the Board (and with it, the inevitable dismissal of the no-camera-rule allegation there, based on *Boeing*) or intervening in this case to urge that the *Boeing* majority erred.

To the contrary, the Union was entitled to do both, that is, to use every available procedural avenue to defend its legal interest, despite the Board majority's persistent efforts to deny the Union due process. The majority's argument is perhaps best understood as groping to invoke the doctrine of judicial (or, here, quasi-judicial) estoppel.[24] But that doctrine cannot apply because (1) the Union has not taken inconsistent positions; (2) even if it had, the Union has not prevailed on one position, only to take another; and (3) in any case, there is no danger of unfairness to any other party in permitting the Union to intervene.[25]

4.

The majority's final reason for denying intervention is that, with *Rio All-Suites* remanded to the Board, the Painters Union will have the "opportunity to make whatever arguments regarding *Boeing* it wishes to make, including that *Boeing* should be overruled." This reason, too, cannot withstand scrutiny.

The argument of the Painters Union is that it was entitled to notice and an opportunity to be heard in *Boeing*—*before* the Board expressly overruled *Rio All-Suites*. For all of the reasons offered here, that argument is appropriately made *in Boeing*. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[26] Here, that means (at the very least) the opportunity to argue that *Boeing* should be *reconsidered*—i.e., reevaluated by the Board in a continuation of the same proceeding that led to the decision, before it is given full precedential effect. The opportunity to argue that *Boeing* should be *overruled*, of course, is open to any party in any post-*Boeing* case. In that context, however, the party will confront the doctrine of stare decisis. Fairness to the Painters Union requires allowing the Union to argue on as clean a slate as possible that the Board's decision in *Boeing* should have followed – not overruled—*Lutheran Heritage* and *Rio All-Suites*, decisions that represented governing law and that had not been called into question by the *Boeing* parties.[27]

Not permitting the Painters Union to intervene, in turn, threatens to prejudice the Union's ability to seek judicial review of the *Boeing* decision itself. Presumably, pursuant to Section 10(f) of the Act, the Union will be able to petition for review of the Board's order today denying intervention, because the Union is clearly aggrieved by that order.[28] But review of today's order may not bring the underlying *Boeing* decision before an appellate court. In this respect, too, the majority seems inexplicably determined to set up procedural obstacles before the Painters Union and to insulate *Boeing* from full judicial scrutiny.

B.

Intervention is the threshold question here. Absent intervention, the Painters Union is not entitled to seek reconsideration of *Boeing*. And because the majority is denying the Union's motion to intervene, the Board does not resolve the Union's due-process attack on *Boeing*. In a footnote, however, the majority addresses the subject, suggesting it would reject the Union's position even if it permitted the Union to intervene. Whether or not this dicta is appropriate, given the majority's claim that the Union will have the opportunity to raise its arguments in *Rio All-Suites* on remand,[29] the majority's discussion

[24] See generally *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (discussing judicial estoppel doctrine). Judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." Id., quoting *Pegram v. Herdrich*, 530 U.S. 211, 227 fn. 8 (2000).

[25] See *Marshall v. Department of Health and Human Services*, 587 F.3d 1310 (Fed. Cir. 2009) (veteran was not judicially estopped from challenging Merit Systems Protection Board order, where veteran had earlier filed unsuccessful petition for enforcement of order and had consistently pursued relief not included in order).

[26] *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

[27] The majority insists that it "makes more sense" to require the Painters Union "to argue its case in the context of the facts of its own case," *Rio All-Suites*. But the *Boeing* Board has already adjudicated the Union's case: *all* no-camera rules, the *Boeing* Board held, are lawful, including—specifically and by name—the one at issue in *Rio All-Suites*. Thus, as previously noted, *Boeing* is not a decision where the Board has adopted a new legal test that leaves other cases to be decided based on their particular facts—the majority's actions have made the facts immaterial.

[28] As noted earlier (see fn. 7, supra), under Sec. 10(f) of the Act, "[a]ny person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order." 29 U.S.C. §160(f).

[29] It would certainly be a surprise if the Board, in deciding *Rio All-Suites* on remand, did anything other than reaffirm *Boeing* in every respect, in light of the majority's discussion today.

reflects a serious misunderstanding of the due-process issues presented by the *Boeing* decision.

Here, as already explained, the Painters Union was a prevailing party in *Rio All-Suites*. While that case was pending in the Ninth Circuit, the *Boeing* Board explicitly reversed *Rio All-Suites* and held that no-camera rules are always lawful—permanently depriving the Union of its previous victory. But the Painters Union had no notice and no opportunity to be heard. *Rio All-Suites*, in other words, was secretly re-adjudicated with no meaningful process at all.

The core of the majority's view seems to be that the Painters Union lacks a protectable due-process interest. For reasons already suggested, that view is flatly inconsistent with the Supreme Court decision in *Scofield*, supra, which held that charging parties in a Board case are entitled to seek judicial review of an adverse Board order and to intervene in an appellate review proceeding in order to defend a favorable Board order. In *Scofield*, the Court distinguished an earlier decision on which the majority's analysis here mistakenly relies.[30] If charging parties in Board cases lacked a due-process interest, of course, the Board would seemingly be free to revise its rules to exclude them from Board proceedings altogether—but the majority surely does not take that extreme position.

The majority cannot and does not argue that the Board is somehow free to ignore due process, whether defined by the Constitution or by the Administrative Procedure Act (APA), which establishes due process guarantees for adjudication by Federal administrative agencies.[31] The Supreme Court has observed that the "Board's procedures are, of course, constrained by the Due Process Clause of the Fifth Amendment."[32] But the Court has also made clear, and there can be no doubt, that the Board's adjudication is subject to the APA.[33] Whatever Fifth Amendment category the interests of a charging party before the Board may fall into, the National Labor Relations Act and the Administrative Procedure Act independently create a due-process interest that the Board must honor.[34]

Notice and opportunity to be heard are essential requirements of due process of law in judicial proceedings.[35] Indeed, early in the Board's history (and even before enactment of the APA), the Court held that the Board violated due process and exceeded its authority when it invalidated certain collective-bargaining agreements without first making the unions who were signatories to the agreements parties to the Board proceeding.[36] It is impossible to understand how due process could permit the Board to deprive the Painters Union of the benefit of a favorable Board decision, issued in a proceeding where it was a party, without *first* giving the Union notice and an opportunity to be heard. The Union can no more be bound by *Boeing* than a Board decision could bind unions whose collective-bargaining agreements were invalidated without notice and opportunity to be heard, and no more than a party's state-court claim can be precluded by the judgment in a proceeding it never knew about. In the Supreme Court's words, the "right to be heard ensured by the guarantee of due process 'has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.'"[37]

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[30] *Scofield*, supra, 382 U.S. at 220–221, distinguishing *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261 (1940) (holding that charging party could not prosecute contempt action involving Board order).

[31] Section 554(c) of the Administrative Procedure Act, for example, provides in part that:

> The agency shall give *all interested parties* opportunity for—
>
> **(1)** the *submission and consideration of facts, arguments*, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and **(2)** to the extent that the parties are unable so to determine a controversy by consent, *hearing and decision on notice*….

5 U.S.C. §554 (emphasis added). See, e.g., *Marine Engineers' Beneficial Ass'n No. 13 v. NLRB*, 202 F.2d 546, 549 (3rd Cir. 1953) (citing APA and holding that charging party is entitled to be heard on objections to proposed formal Board settlement and to seek judicial review of resulting Board order).

[32] *International Telephone & Telegraph Corp. v. Local 134, Int'l Bhd. of Electrical Workers*, 419 U.S. 428, 448 (1975). See, e.g., *Alaska Roughnecks & Drillers Assn. v. NLRB*, 555 F.2d 732, 735 (9th Cir. 1977) (putative joint employer could not be found liable for refusal to bargain, in absence of notice and opportunity to participate in prior representation case leading to union's certification as bargaining representative) ("The conceptual basis for our decision is due process. Its application to NLRB proceedings, like other administrative proceedings, is not novel.").

[33] *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998).

[34] See, e.g., *Independent Electrical Contractors of Houston, Inc. v. NLRB*, 720 F.3d 543, 552 (5th Cir. 2013) (applying principles of "[a]dministrative due process, reflecting constitutional standards," and citing APA to find that respondent employer was entitled to prior notice of novel legal theory of liability applied by Board).

[35] See, e.g., *Richards v. Jefferson County, Alabama*, 517 U.S. 793, 797 fn. 4, 799 (1996) (in light of due process guarantees, prior judgment cannot have res judicata effect on person who had no notice and opportunity to be heard in prior litigation).

[36] *Consolidated Edison Co. of New York v. NLRB*, 305 U.S. 197, 218–219 (1938).

[37] *Richards v. Jefferson County, Alabama*, supra, 517 U.S. at 799, quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

III.

The Board plainly erred in issuing *Boeing* using the arbitrary and unfair process that it did. It could easily have observed due process by (1) issuing a public notice and invitation to file briefs, announcing that it was considering whether to overrule *Lutheran Heritage Village*, *Rio All-Suites*, and the other decisions it ultimately reversed; and (2) seeking a remand of *Rio All-Suites* from the Ninth Circuit so that it could have reconsidered that case simultaneously with consideration of *Boeing*,[38] while providing notice and opportunity to be heard to the *Rio All-Suites* parties, including the Painters Union. The rush to judgment reflected in *Boeing* instead made a mockery of due process rights. Today's decision compounds that grievous error. Accordingly, we dissent.

Dated, Washington, D.C. July 17, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

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[38] See, e.g., *E.I. du Pont de Nemours*, 274 NLRB 1104, 1104 (1985) (subsequent history omitted) (Board decision reconsidering prior decision: Board requested remand from court of appeals, case was remanded, charging party was permitted to intervene, and parties were invited to file statements of position).